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May 19, 2004

EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Verizon Telephone Companies Petition for Reconsideration, "In the Matter of Stale or Moot Docketed Proceedings", CC Docket Nos. 93-193, 94-65 and 94-157

Dear Ms. Dortch:

Yesterday, Susanne Guyer, Edward Shakin and Joseph Dibella, representing Verizon, met with Scott Bergmann of Commissioner Adelstein's office to discuss the above dockets. The materials discussed during the meeting are attached.

Please let me know if you need any further assistance.

Sincerely,

/s/Joseph Dibella

Attachment

cc: S. Bergmann

"RAO 20" Tariff Investigation

This investigation concerns Verizon's and other ILECs' calculations, for the period 1993-1996, of the interstate rate base, which affects the rate of return and in turn the price cap carriers' sharing obligations under the old rules. The Commission's rules in effect during that period expressly defined the interstate rate base. Section 65.800 stated that the "rate base *shall consist of* the interstate portion of the *accounts listed in § 65.820* . . . , *minus* any deducted items computed *in accordance with § 65.830*." 47 C.F.R. § 65.800 (1996) (emphasis added). Section 65.830, in turn, required deductions for five specified accounts, based on the Uniform System of Accounts set forth in 47 C.F.R. part 32, *see id.* § 65.810, and provided a methodology for calculating the interstate portion of those accounts, *see id.* § 65.830. With respect to one of those five accounts — Account 4310 — carriers were directed to deduct from the rate base only the "interstate portion of unfunded accrued pension costs." *Id.* § 65.830(a)(3). OPEBs, by definition, are post-retirement employee benefits *other* than pensions, and therefore were not covered by § 65.830(a)(3). *See Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 168 (D.C. Cir. 1994) ("The 'other,' which explains the 'O' in the OPEB acronym, is intended *to exclude pension benefits*; what is left generally consists of retirees' life insurance and medical and dental care benefits.") (emphasis added).

This investigation is referred to as "RAO 20" because, in 1992, the Common Carrier Bureau issued an advisory letter entitled RAO 20 instructing carriers to deduct OPEB liabilities from the rate base.[1] This increased their rate of return and their sharing obligations. In 1996, the Commission issued an order vacating RAO 20, on the ground that the regulations "define[d] explicitly those items to be . . . excluded from[] the interstate rate base" and the Bureau's

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[1] 7 FCC Rcd 2872 (1992).

requirement to exclude OPEBs "directed [an] exclusion[] from . . . the rate base *for which the Part 65 rules do not specifically provide*."[2] In the same order, the Commission proposed an amendment to its rules to require such deductions, but carriers had to file their 1996 annual access tariffs before the Commission completed that rulemaking. In those tariffs, they followed the *RAO 20 Rescission Order* and, in calculating their sharing obligations for 1996, reversed their deduction of OPEB liabilities for the prior years' rates of return. In 1997, the Commission finalized the rulemaking and amended § 65.830 to require the deduction of OPEB liabilities from the rate base.[3] The Commission also denied a request for reconsideration of the *RAO 20 Rescission Order* and reaffirmed that "[g]iving rate base recognition to OPEB in Part 65," as RAO 20 did, "constitute[d] a *rule change*" and therefore could not be accomplished "through an interpretation" of the rules in effect from 1993-1996. *RAO 20 Rulemaking* ¶¶ 25, 28 (emphasis added).

The Commission's amendment to § 65.830 applies only prospectively. Absent express authorization from Congress — and there is none here — an agency has no authority to promulgate a rule that would retroactively "'increase a party's liability for past conduct.'" *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588-89 (D.C. Cir. 2001) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)); *see General Motors Corp. v. National Highway Traffic Safety Admin.*, 898 F.2d 165, 169 (D.C. Cir. 1990) ("a grant of legislative rulemaking

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[2] Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pension in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 11 FCC Rcd 2957, ¶ 25 (1996) (emphasis added) ("*RAO 20 Rescission Order*").

[3] *See* Report and Order, *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pension in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 12 FCC Rcd

authority will not be understood 'to encompass the power to promulgate retroactive rules unless that power is conveyed in express terms.'") (quoting *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 208 (1988)). Because applying its 1997 amendment to § 65.830 to require refunds for a tariff filed *in 1996* would have precisely that prohibited effect, the Commission cannot rely on its decision in the *RAO 20 Rulemaking* in resolving its investigation of Verizon's 1996 tariff filings. Indeed, at the time of the *RAO 20 Rulemaking*, AT&T conceded that "any change to the Part 65 rules will affect the rate base on a prospective basis and *will not affect the pending OPEB investigations*." *RAO 20 Rulemaking* ¶ 22 (emphasis added).

Nor is the Commission free to "re-interpret" the Part 65 regulations in place prior to 1997 to compel additional deductions from the rate base beyond those specified in the rules. As described above — and as the Commission has held — the rate base rules "define[d] explicitly those items to be included in, or excluded from, the interstate rate base" *RAO 20 Rescission Order* ¶ 25. In other words, as the Commission has explained, the "rate base rules . . . list the Part 32 accounts that *are to be included in and excluded from* the rate base." *Id.* ¶ 1 n.3 (emphasis added); *accord RAO 20 Rulemaking* ¶ 9 n.16. Indeed, the rules in effect in 1996, by their terms, were mandatory and precluded carriers from including in — or excluding from — the rate base any items not expressly set forth in those rules. Thus, § 65.800 states that the "rate base *shall* consist" of specified portions of "the accounts *listed in* § 65.820," less any deductions "computed *in accordance with* § 65.830." 47 C.F.R. § 65.800 (1996) (emphases added); *see, e.g.*, *Association of Am. R.R. v. Costly*, 562 F.2d 1310, 1312 (D.C. Cir. 1977) ("'shall' is the language of command"). Similarly, § 65.830 states that the "following items *shall* be deducted from the interstate rate base." 47 C.F.R. § 65.830 (1996) (emphasis added). Nothing in the text

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2321 (1997) ("*RAO 20 Rulemaking*"). Section 65.830(a)(3) now requires deduction of the of the rules suggests that there exist other, unspecified amounts that a carrier may be required to include in, or deduct from, the rate base.[4]

Moreover, the Commission has already *twice* held that those rules could *not* be interpreted to require the deduction of OPEBs. *See RAO 20 Rescission Order* ¶ 25 ("the Part 65 rules do not specifically provide" for deduction of OPEBs); *RAO 20 Rulemaking* ¶¶ 25, 28 (requiring deduction of OPEBs "constitute[d] a rule change" and could not be accomplished "through an interpretation" of the existing rules). Having thus "give[n] its regulation an interpretation," the Commission "can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *see, e.g.*, *Air Transport Ass'n v. FAA*, 291 F.3d 49, 56-57 (D.C. Cir. 2002); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622,

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"interstate portion of other long-term liabilities."

[4] AT&T claims that the Commission has "*never* read the Part 65 list of inclusions and deductions to be . . . exclusive," AT&T Ex Parte, CC Docket Nos. 93-193 *et al.*, at 2-3 (filed Apr. 13, 2004), but the only decision that AT&T cites — involving an investigation of an Ameritech tariff — actually supports Verizon's position. In adopting the Part 65 rules in 1987, the Commission, among other things, "reaffirmed its policy, first adopted in 1977, of excluding 'non-cash' items" from the "lead-and-lag calculations" used to determine cash working capital. *See Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 783 (D.C. Cir. 1990). BellSouth sought reconsideration of the Commission's decision, which it described as "exclu[ding] . . . non-cash items," such as "the cost of common stock equity," from cash working capital calculations Order on Reconsideration, *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, 4 FCC Rcd 1697, ¶ 24 (1989). The Commission denied BellSouth's petition, finding that it had correctly excluded equity expenses, and other non-cash items, from its cash-working-capital rule. *See id.* ¶¶ 28-32. Ameritech, however, later claimed that the 1989 order denying reconsideration was the "first time" the Commission held that equity was among the non-cash expenses excluded from cash working capital and, therefore, that Ameritech properly included an "equity component in its [1988] cash working capital." Order to Show Cause, *Ameritech Telephone Operating Companies*, 10 FCC Rcd 5606, App. A, ¶ 5 (1995). The Commission rejected that claim, explaining (as BellSouth had recognized) that its "cash working capital" rules had "always" been limited to "*cash* expenses." *Id.* ¶ 6 (emphasis added). The Commission thus did not, as AT&T claims, *add* a new requirement to its rate base rules during a tariff investigation; it instead

629 (5th Cir. 2001); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999). As explained above, such a new regulation can apply prospectively *only*. In any event, even if the Commission could change its interpretation of § 65.830(a)(3) retroactively, this tariff investigation is not the type of rulemaking that would permit the Commission formally to modify a regulation or a prior interpretation of a regulation. *See* Memorandum Opinion and Order, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 5 FCC Rcd 4861, ¶¶ 7-8 (1990) ("*Special Access Tariffs Order*") ("Section 204(a) are rulemakings of particular applicability," in which the Commission "merely applies the obligations imposed by the statute or *previously adopted Commission rules* to particular carrier conduct") (emphasis added); *see also Southwestern Bell*, 28 F.3d at 169 (Commission, in tariff investigation, "was bound to follow [existing rules] until such time as it altered them through another rulemaking").

The Commission cannot evade this limitation by suggesting that, because different accounting rules applied to OPEBs when the Commission promulgated its rate base rules, the Commission now has discretion in the context of a tariff proceeding to find that a carrier's treatment of OPEBs was not just and reasonable. When the Commission promulgated those rules in 1987, no different from today, Account 4310 included not only "amounts accrued . . . [for] unfunded pensions," but also "other long-term liabilities not provided for elsewhere." 47 C.F.R. § 32.4310(a) (1987). In its Notice of Proposed Rulemaking, the Commission proposed to define the amounts to be deducted from the rate base as the "interstate portion of zero-cost funds," defined as "*all* funds . . . provided to a carrier without cost to the carrier." *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Bases and Net Incomes*

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rejected a carrier's misinterpretation of those rules. *See id.* (holding that its rules "cannot *of Dominant Carriers*, 2 FCC Rcd 332, App. A (1986) (proposed 47 C.F.R. §§ 65.810(b), 65.830) (emphasis added). Such a rule, if adopted, would have included not only pensions, but also any zero-cost "other long-term liabilities" that might be included in Account 4310. But the Commission did not adopt its proposed rule. Instead, it replaced its broad, all-zero-cost-funds proposed rule with a rule listing the specific portions of specific accounts that "shall" be deducted from the rate base — including the "interstate portion of unfunded accrued pension costs (Account 4310)," but not any other portion of that account. Report and Order, *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, 3 FCC Rcd 269, Appendix B (1987) ("*Rate Base Components Order*") (promulgating 47 C.F.R. § 65.830).

Therefore, long before the Commission approved a change to the accounting rules for OPEBs, the rate base rules singled out pension expenses for special treatment — deduction from the rate base — that did not apply to analogous "other long-term liabilities" included in Account 4310. And when the Commission upheld the portion of RAO 20 that required carriers to include OPEBs in Account 4310, it explained that this account includes "amounts accrued for such items as . . . other long-term liabilities not provided for elsewhere in Part 32" and that "[u]nfunded OPEB liabilities fall into this category." *RAO 20 Rescission Order* ¶ 25. In other words, the Commission held that OPEBs are among the portions of Account 4310 that expressly are *not* required to be deducted from the rate base. As the Commission previously recognized, it could not require deduction from the rate base of one of these "other long-term liabilities" — namely,

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logically or legally be relied upon to justify including equity in [pre-1989] calculations").

OPEBs — "through an interpretation" of its existing rules, but instead "a rule change" would be required to give "rate base recognition to OPEB in Part 65." *RAO 20 Rulemaking* ¶¶ 25, 28.[5]

Finally, Verizon's compliance with the Commission's contemporaneous interpretation of its rules — which "d[id] not specifically provide" for deduction of OPEBs from the rate base[6] — cannot be grounds for finding that its 1996 tariff filings were unjust or unreasonable. As explained above, in a tariff investigation, the Commission assesses the lawfulness of "particular carrier conduct" against "the obligations imposed by the statute or *previously adopted* Commission rules." *Special Access Tariffs Order* ¶ 8 (emphasis added).

In sum, the Commission has already decided that its prior rules did not require the deduction of OPEBs from the rate base and has no authority to modify its interpretation of those rules or otherwise to find Verizon liable for complying with those rules.

[5] Because the Commission's pre-1997 rate base regulations were unambiguous, any new interpretation of those regulations to require deduction of OPEBs would receive no deference. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (deference to an agency's interpretation of its regulation "is warranted only when the language of the regulation is ambiguous"). Where a regulation is unambiguous, courts construe the regulation according to its plain meaning and reject any inconsistent agency interpretation, because to defer to such an interpretation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.*; *see Garvey v. National Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999); *Hoctor v. Department of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996); *Municipal Resale Serv. Customers v. FERC*, 43 F.3d 1046, 1053 (6th Cir. 1995).

[6] *RAO 20 Rescission Order* ¶ 25.

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May 13, 2004

EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: 1993 Annual Access Tariffs, CC Docket No. 93-193; 1994 Annual Access Tariffs, CC Docket No. 94-65

Dear Ms. Dortch:

As Verizon has demonstrated in its comments, the Commission cannot legally apply its "add-back" rule retroactively to tariffs filed prior to the 1995 effective date of the add-back rule change. In *Bell Atlantic Telephone Companies v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) the Court found that the enforcement of the rule in the 1995 annual access tariff filings was acceptable because it only affected the 1995 tariffs, even if it calculated a carrier's rate of return for the 1994 base year using add-back. The Court made it clear that the new rules did not apply to earlier tariffs or require refunds of money collected under those tariffs. ***See id.*** at 1206.

If the Commission nonetheless concludes that it is legally authorized to order refunds in this context, it should exercise its well-established equitable discretion not to do so. The ordering of refunds in a tariff investigation is not automatic. To the contrary, refunds are "a matter of equity," and the Commission must "balance the interests of both the carrier and the customer in determining the public interest," with "each case . . . examined in light of its own particular circumstances." *American Television Relay*,[1] ¶ 15; *see Public Service Comm'n v. Economic*

[1] Memorandum Opinion and Order, *American Television Relay, Inc., Refunds Resulting from the Findings and Conclusions in Docket 19609*, 67 F.C.C.2d 703 (1978).

Economic Regulatory Admin., 777 F.2d 31, 36 & n.5 (D.C. Cir. 1985); *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981). As the D.C. Circuit has explained, "once the Commission finds that a carrier has exceeded (as a pure mathematical matter) its prescribed rate of return, it then should consider other relevant factors in determining whether a rate is unreasonable and a refund warranted. *Virgin Islands Tel. Corp. v.* FCC, 989 F.2d 1231, 1239 (D.C. Cir. 1993).[2] Those factors include (1) whether the LECs' projections were reasonable when made, (2) the actual harm suffered by the ratepayer, and (3) any overriding equitable considerations. *Id.* at 1240. Applying a similar standard, the Commission has found it inappropriate to order refunds in a number of proceedings where it found that a carrier had overearned.[3]

Here, the factors set forth in *Virgin Islands* likewise militate against a refund. The first factor (reasonable projections) is directly relevant only in a rate-of-return context, which is not applicable here. Nonetheless, by analogy, the LECs that did not use add-back in 1993 and 1994 acted eminently reasonably, since the Commission did not mandate the use of add-back until 1995.

The second factor (ratepayer harm) likewise counsels against a refund because there is no reason to believe there was any harm to access customers here. Rather, AT&T and other IXCs undoubtedly passed the LECs' access charges through to customers as an element of their long distance rates. *See AT&T Communications Tariff FCC Nos. 1 and 2 Transmittal Nos. 5460, 5461, 5462 and 5464*, 8 FCC Rcd 6227 (1993). While end users may have paid more than they should have for long distance services, there is no mechanism for assuring that they would receive the benefit of any refund now, so any refund (or forward-looking reduction in the PCI) would simply create a windfall for IXCs – many of whom did not even exist in 1993 and 1994.[4] And even if IXCs passed through refunds (or lower access charges) to their customers – and there is no reason to believe they will – the customers that would benefit are not those that suffered harm from alleged overcharges in the early 1990s. Not only has the passage of time changed the composition of the customers that use long-distance services, but those customers now use cell phones, cable telephony, and e-mail as substitutes for wireline long distance service.

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[2] The same principle holds true in the price cap context, since the court was interpreting Section 204 of the Act, which applies to tariff investigations under any regulatory framework.

[3] *See, e.g.*, Memorandum Opinion and Order, *Tariffs Implementing Access Charge Reform*, 13 FCC Rcd 14683 (1998); Memorandum Opinion and Order, *Local Exchange Carrier Access Tariff Rate Levels; Bell Atlantic Telephone Companies Tariff F.C.C. No. 1; GVNW Inc./Management Bourbeuse Telephone Company Tariff F.C.C. No. 1*, 8 FCC Rcd 6202 (1993); Memorandum Opinion and Order, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 5 FCC Rcd 1717 (1990).

[4] Ordering a refund that has the effect of reducing access charges also would go beyond the rate reductions called for in the *CALLS Order* and thereby undo the guarantee of a particular rate level for switched access that was part of the CALLS compromise. *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 15 FCC Rcd 12962, ¶ 166 (2000).

The third factor (general equitable considerations) also militates against a refund. As Verizon previously has explained, it reasonably relied on the *Bell Atlantic* court's ruling that the new add-back rules did not require refunds. ***See*** *Bell Atlantic* at 1207 (application of the add-back rule to the 1995 annual access tariffs was not retroactive because it "does not change the past legal consequences of carriers' decisions to choose" the X-factors in previous annual access tariff filings). It is patently unfair to undermine that reliance here – particularly since the lengthy delay in resolving this issue has prejudiced Verizon's ability to defend the tariff filings at issue. In the more than ten years since the Bureau initiated the first of these investigations, key personnel and expert witnesses who helped prepare Verizon's tariff filings have left the company or moved on to other responsibilities, and memories have faded. It is inequitable for the Commission to order refunds when its own delay has compromised a party's ability to defend its decade-old tariff filings and therefore has contributed to an adverse ruling on the tariff's lawfulness.

If the Commission nonetheless determines that (1) it has authority to apply the add-back rule retroactively in the above-referenced 1993 and 1994 tariff investigations, and (2) some form of refund would be equitable, it should require refunds due as a result of any tariff revisions to be developed only on a total company basis.[5] The Commission should not require the carriers to provide refunds for study areas that would have had increased sharing obligations (and lower rates) without offsetting the amounts by which other study areas would have had larger lower formula adjustments (and higher rates). For example, during the period at issue, the former GTE companies had twenty-six interstate tariff entities. ***See*** GTE Reply Comments, CC Docket No. 93-179 at 10 (filed Sep. 1, 1993). In 1991, some of these tariff entities were in the sharing mode and some were in the lower formula adjustment mode. This resulted in adjustments to 1992-1993 revenues (revenue reductions for sharing entities and revenue increases for lower formula adjustment entities). When GTE filed its access tariffs in 1993 and 1994, it did not apply add-back to any of its 1992 and 1993 revenues, regardless of whether the tariff entity was under sharing or lower formula adjustment. In other words, it did not add the revenues in the sharing states or reduce revenues in the lower formula adjustment states. This was consistent with its view that the Commission's price cap rules did not incorporate the add-back mechanism that had been part of the previous rate-of-return enforcement mechanism. GTE pursued a consistent approach in all tariff entities, despite the fact that applying add-back in the lower-formula-adjustment entities would have increased the lower formula adjustment and allowed higher rates.

If GTE were required to provide refunds to reflect the increased sharing obligations produced by add-back, it should be allowed to offset its refunds by the amount of increased lower formula adjustment that it would have obtained through add-back. As explained above, the ordering of refunds in a tariff investigation is not automatic – it is an equitable decision within

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[5] The offset calculation, moreover, should aggregate both tariff years (1993 and 1994). GTE should not be required to provide refunds for one year if the higher rates due to addback in the other year would offset some or all of those refunds. Failing to do so could expose the company to financial liability when none should apply, since the IXCs that purchased access in 1993 almost certainly did so in 1994 as well.

the Commission's discretion. ***See, e.g.***, *Las Cruces TV Cable v. FCC*, 645 F.2d at 1047-8. Here, fundamental fairness dictates that a carrier such as GTE, which had different tariff entities for different study areas, should not be treated differently than a carrier with a single tariff entity for multiple study areas. Otherwise, a carrier with multiple tariff entities would be able to protect itself only by adopting the ratemaking methodology that maximized revenues in each study area, regardless of whether the approaches in different study areas were inconsistent. Access customers, who generally obtained GTE services in all study areas, would be unjustly enriched if they were to receive refunds in the sharing areas without offset from the higher rates due to add-back in the lower formula adjustment areas. A carrier such as GTE should not be penalized for adopting a consistent position on add-back across all of its study areas.

The D.C. Circuit's decision in *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995) in no way constrains the Commission's ability to exercise its equitable discretion to offset refunds by the amount of an increased lower formula adjustment that the GTE entities, taken as a whole, could have obtained through add-back. The *MCI* case arose in an entirely different context – complaints for refunds based on violations of the Commission's category-specific rate of return prescriptions. In that context, the court explained that the Commission's hands were tied: unlike a Section 204 tariff investigation, where the Commission has permissive authority to determine refund liability, "[i]n the present cases … the Commission is responding to complaints brought by customers of the LECs under § 206 of the Act, which is phrased in mandatory terms. … Therefore, the factors that we set out in the *Virgin Islands* case do not apply where, as here, the Commission is adjudicating a damage claim made by a customer pursuant to § 206." *Id.* at 1414. Here, in contrast, the Commission's discretionary authority under § 204 is unconstrained – and, given that the Commission has discretion not to order refunds at all, it must have discretion to determine how much any refunds should be, taking into account the equitable factors discussed above.

In addition, the specific considerations relied on by the D.C. Circuit in invalidating the Commission's "limited offset" policy, which reduced damages for overearnings in one category by a LEC's underearnings in other access categories, do not apply here. The court held that the limited offset policy (1) was inconsistent with FCC precedent that prevented the Commission from using claims by carriers against customers to offset claims by customers against carriers, (2) amounted to an implicit determination that the defendant LEC was entitled to earn more than the amount that it actually earned from the rates it charged, even though there was no such entitlement under rate of return regulation, and (3) discriminated between those IXCs that filed complaints and those that did not. *Id.* at 1417-1420.

The Commission's precedent against using claims by carriers against customers as an offset in determining damages in the § 206 context is irrelevant here because this case arises under § 204, not § 206. There are no claims between carriers and customers in either direction; this is simply a tariff investigation. Nor would an equitable offset here violate rate of return regulation, for the simple reason that this case arises under price cap regulation. Indeed, while the Commission had stated that the authorized rate of return is only a maximum, not a minimum, the opposite holds true for the low-end adjustment. Here, LECs were entitled to earn at least 10.25 percent under price cap regulation; the failure to do so enabled them to claim a low-end adjustment. If LECs are forced to refund in sharing states but not to offset the amount of that reduction based on underearnings in low-end adjustment states, the very premise of the price cap framework would be violated. Finally, there is no discrimination among IXCs here because, once again, this is a tariff investigation, not a complaint case. And, even apart from the different legal context, there is every reason to believe, as noted above, that IXCs would have taken access services throughout GTE's service area, ameliorating any concern that some IXCs would receive more than they should and some less.

Sincerely,

/s/Joseph DiBella

cc: T. Preiss
D. Shetler

Verizon Followed the Commission's Accounting Rules

These cases go back over ten years. The issue in each case is whether Verizon complied with the Commission's accounting rules as they existed at that time, not as they were later amended. In all cases, Verizon followed the Commission's rules. The Commission should not do again what it has already been criticized by the D.C. Circuit for doing in the context of OPEB accounting requirements – "concocting a new rule in the guise of applying the old." *Southwestern Bell v. FCC*, 28 F.3d 165, 173 (D.C. Cir. 1994).

<u>Pre-1993 OPEB costs.</u> This deals with the exogenous adjustment associated with the OPEB accounting rule change. In 1990, the Financial Accounting Standards Board adopted the "OPEB" accounting rule, which required companies to accrue liabilities for "Other Post-Employment Benefits," consisting mainly of health care benefits for retirees. The Commission approved this change for USOA accounting purposes on December 26, 1991, requiring carriers to make it effective "on or before January 1, 1993," and stating that "earlier implementation is encouraged." *Southwestern Bell GTE Service Corp. Notification of Intent to Adopt Statement of Financial Accounting Standards No. 106*, 6 FCC Rcd 7560, ¶¶ 2, 3 (1992). Bell Atlantic informed the Commission on December 31, 1991, that it had implemented that accounting practice starting with the year 1991. In 1993, after the Commission indicated that the carriers could file tariffs seeking exogenous adjustments for certain types of OPEB costs, Bell Atlantic filed tariffs for its 1991 through 1993 OPEB costs. In the meantime, in the *Southwestern Bell* decision, the D.C. Circuit recognized that the Commission's "control" test for exogenous costs – that a cost must be beyond the control of the carrier – was met for the OPEB change "simply by the fact of the exogenous imposition of the accounting rule." 28 F.3d at 170. This meant that Bell Atlantic had met the test once the Commission approved the accounting change. The fact that Bell Atlantic may have had some "control" over the year in which it adopted the accounting change – after being encouraged by the Commission to adopt it early – does not change that result.

<u>RAO 20</u>. This concerns the calculation of the interstate rate base, which affects the rate of return and in turn the price cap carriers' sharing obligations under the old rules for the period 1993-1996. The Commission's rules in effect during that period explicitly defined the rate base. Section 65.800 stated that it consists of the specific asset accounts listed in section 65.820 minus the deductions listed in section 65.830 (the text of the two provisions are attached). In 1996, the deductions in section 65.830 included accrued pension liabilities, but they did not include OPEBs, which by definition are benefits *other* than pensions.

This issue is called "RAO 20" because the Common Carrier Bureau issued an advisory letter entitled RAO 20 in 1992 instructing the carriers to deduct OPEB liabilities from the rate base. This increased their rate of return and their sharing obligations. In 1996, the Commission issued an order reversing RAO 20, because there was no way to interpret section 65.830 as requiring deduction of OPEB liabilities. *RAO 20 Rescission Order*, 11 FCC Rcd. 2957 (1996) (¶¶ 25-32 are attached). In the same order, the

Commission proposed a rule change to require such deductions, but in the meantime the carriers had to file their 1996 annual access tariffs. In those tariffs, they followed the ruling of the *RAO 20 Rescission Order* and reversed the deduction of OPEB liabilities for the prior years' rate of return to calculate the sharing obligations for 1996. It was not until 1997 that the Commission finalized the rulemaking and changed section 65.830 to require deduction of OPEB liabilities from the rate base. Since rulemakings only have prospective effects, Verizon applied this rule in the 1997 and later tariff filings. In the 1997 rulemaking order, the Commission specifically found that the previous rules could not be interpreted to allow deduction of OPEB liabilities from the rate base. ***See** RAO 20 Rulemaking*, 12 FCC Rcd 2321, ¶¶ 25, 28 (1997) (attached). Since the Commission has already found that, under the terms of its rules in effect during the period at issue, "[s]ections 65.820 and 65.830 of our rules define explicitly those items to be included in, or excluded from, the interstate rate base" (*RAO 20 Rescission Order*, ¶ 25) and that "accrued OPEB liabilities are not removed from the rate base" (id., ¶ 32), there is no basis to impose such a requirement.

<u>Add-Back</u>. "Add-back" is a procedure under which the rate of return that was used to compute a price cap carrier's sharing obligation included an adjustment to the previous year's revenues to add sharing amounts or deduct lower formula adjustment amounts that were included in the prior rate case. In 1993, the Commission changed the form used to calculate rate of return in the prior regime and removed the line for calculation of an add-back adjustment. At the time, add-back was neither required nor prohibited – the Commission explained that "this issue was neither expressly discussed in the LEC price cap orders, nor clearly addressed in our Rules." *Price Cap Regulation of LEC Rate of Return Sharing and Lower Formula Adjustment,* 8 FCC Rcd 4415, ¶ 4 (1993). While it had proposed a rule requiring add-back, the Commission deliberated two years as to the correct rule. In 1995, the Commission adopted a rule for the first time explicitly requiring add-back for sharing calculations. When the D.C. Circuit upheld a challenge to the 1995 rule change, it noted that the rule change was not impermissibly retroactive because it was prospective only – it applied only to the 1995 and later tariff filings. *Bell Atlantic v. FCC*, 79 F.3d 1195, 1206 (D.C. Cir. 1996). As a result it did not "change or invalidate any current tariffs" and so only had secondary retroactive effect, which could be upheld if reasonable. *Id.* This contrasts with the period prior to the rule change, where an add-back requirement would "change the past legal consequences" of carriers' decisions. *Id.*

The issue here is whether add-back was required for the 1993 and 1994 annual access tariff filings. Since it was not addressed in the price cap rules, some carriers did it while others did not. Either approach was a reasonable interpretation of the accounting rules prior to the time that the Commission adopted the add-back rule, because neither approach was guaranteed to maximize a carrier's revenues – it would depend on whether a carrier would be in an under-earning or over-earning situation in the future, which no carrier could predict. The Commission should not penalize carriers that did not apply the add-back requirement prior to the rule change.

§ 69.121; Common Line, §§ 69.104–69.105; and an aggregated category consisting of Line Termination, § 69.106, Intercept, § 69.108, Local Switching, § 69.107, Transport, §§ 69.110–69.112, 69.124, 69.125, and Information, § 69.109. The Billing and Collection access element shall not be included in any access service category for purposes of this part. The Commission will also separately review exchange carrier overall interstate earnings subject to this part for determining compliance with the maximum allowable rate of return determined by § 65.700(b).

(b) For exchange carriers, earnings shall be measured for purposes of determining compliance with the maximum allowable rates of return separately for each study area; provided, however, that if the carrier has filed or concurred in access tariffs aggregating costs and rates for two or more study areas, the earnings will be determined for the aggregated study areas rather than for each study area separately. If an exchange carrier has not utilized the same level of study area aggregation during the entire two-year earnings review period, then the carrier's earnings will be measured for the entire two-year period on the basis of the tariffs in effect at the end of the second year of the two-year review period; provided, however, that if tariffs representing a higher level of study area aggregation were not in effect for at least eight months in the second year, then the carrier's earnings will be measured on the basis of the study area level of aggregation in effect for the majority of the two-year period; provided further, that any carrier that was not a member of the National Exchange Carrier Association or other voluntary pools for both years of the two-year review period will have its earnings reviewed individually for the full two-year period.

[51 FR 11034, Apr. 1, 1986, as amended at 57 FR 54719, Nov. 20, 1992; 58 FR 48763, Sept. 17, 1993; 60 FR 28546, June 1, 1995]

Subpart G—Rate Base

SOURCE: 53 FR 1029, Jan. 15, 1988, unless otherwise noted.

§ 65.800 Rate base.

The rate base shall consist of the interstate portion of the accounts listed in § 65.820 that has been invested in plant used and useful in the efficient provision of interstate telecommunications services regulated by this Commission, minus any deducted items computed in accordance with § 65.830.

§ 65.810 Definitions.

As used in this subpart "account xxxx" means the account of that number kept in accordance with the Uniform System of Accounts for Class A and Class B Telecommunications Companies in 47 CFR part 32.

§ 65.820 Included items.

(a) *Telecommunications Plant.* The interstate portion of all assets summarized in Account 2001 (Telecommunications Plant in Service) and Account 2002 (Property Held for Future Use), net of accumulated depreciation and amortization, and Account 2003 (Telecommunications Plant Under Construction), and, to the extent such inclusions are allowed by this Commission, Account 2005 (Telecommuni cations Plant Adjustment), net of accumulated amortization. Any interest cost for funds used during construction capitalized on assets recorded in these accounts shall be computed in accordance with the procedures in § 32.2000(c)(2)(x) of this chapter.

(b) *Material and Supplies.* The interstate portion of assets summarized in Account 1220.1 (Material and Supplies).

(c) *Noncurrent Assets.* The interstate portion of Class B Rural Telephone Bank stock contained in Account 1402 (Investment in Nonaffiliated Companies) and the interstate portion of assets summarized in Account 1410 (Other Noncurrent Assets), Account 1438 (Deferred Maintenance and Retirements), and Account 1439 (Deferred Charges) only to the extent that they have been specifically approved by this Commission for inclusion. Otherwise, the amounts in accounts 1401–1500 shall not be included.

(d) *Cash Working Capital.* The average amount of investor-supplied capital needed to provide funds for a carrier's day-to-day interstate operations. Class

A carriers may calculate a cash working capital allowance either by performing a lead-lag study of interstate revenue and expense items or by using the formula set forth in paragraph (e) of this section. Class B carriers, in lieu of performing a lead-lag study or using the formula in paragraph (e) of this section, may calculate the cash working capital allowance using a standard allowance which will be established annually by the Chief, Common Carrier Bureau. When either the lead-lag study or formula method is used to calculate cash working capital, the amount calculated under the study or formula may be increased by minimum bank balances and working cash advances to determine the cash working capital allowance. Once a carrier has selected a method of determining its cash working capital allowance, it shall not change to an optional method from one year to the next without Commission approval.

(e) In lieu of a full lead-lag study, carriers may calculate the cash working capital allowance using the following formula.

(1) Compute the weighted average revenue lag days as follows:

(i) Multiply the average revenue lag days for interstate revenues billed in arrears by the percentage of interstate revenues billed in arrears.

(ii) Multiply the average revenue lag days for interstate revenues billed in advance by the percentage of interstate revenues billed in advance. (Note: a revenue lead should be shown as a negative lag.)

(iii) Add the results of paragraphs (e)(1) (i) and (ii) of this section to determine the weighted average revenue lag days.

(2) Compute the weighted average expense lag days as follows:

(i) Multiply the average lag days for interstate expenses (*i.e.*, cash operating expenses plus interest) paid in arrears by the percentage of interstate expenses paid in arrears.

(ii) Multiply the average lag days for interstate expenses paid in advance by the percentage of interstate expenses paid in advance. (Note: an expense lead should be shown as a negative lag.)

(iii) Add the results of paragraphs (e)(2) (i) and (ii) of this section to determine the weighted average expense lag days.

(3) Compute the weighted net lag days by deducting the weighted average expense lag days from the weighted average revenue lag days.

(4) Compute the percentage of a year represented by the weighted net lag days by dividing the days computed in paragraph (e)(3) of this section by 365 days.

(5) Compute the cash working capital allowance by multiplying the interstate cash operating expenses (*i.e.*, operating expenses minus depreciation and amortization) plus interest by the percentage computed in paragraph (e)(4) of this section.

[54 FR 9048, Mar. 3, 1989, as amended at 60 FR 12139, Mar. 6, 1995]

§ 65.830 Deducted items.

(a) The following items shall be deducted from the interstate rate base.

(1) The interstate portion of deferred taxes (Accounts 4100 and 4340).

(2) The interstate portion of customer deposits (Account 4040).

(3) The interstate portion of unfunded accrued pension costs (Account 4310).

(4) The interstate portion of other deferred credits (Account 4360) to the extent they arise from the provision of regulated telecommunications services. This shall include deferred gains related to sale-leaseback arrangements.

(b) The interstate portion of deferred taxes, customer deposits and other deferred credits shall be determined as prescribed by 47 CFR part 36.

(c) The interstate portion of unfunded accrued pension costs shall bear the same proportionate relationship as the interstate/intrastate expenses which give rise to the liability.

[54 FR 9049, Mar. 3, 1989]

PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

Subpart A—General

Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32 Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base,
11 FCC Rcd 2957 (1996)

25. After reviewing the record on this issue, we find that RAO 20 exceeded the Bureau's delegated authority to the extent that it directed exclusions from and additions to the rate base for which the Part 65 rules do not specifically provide. Sections 65.820 and 65.830 of our rules n62 define explicitly those items to be included in, or excluded from, the interstate rate base. The Bureau cannot properly address any additional exclusions in an RAO letter, which under Section 32.17 of our rules n63 must be limited to explanation, interpretation, and resolution of accounting matters. Accordingly, the portion of RAO 20 that addresses the rate base treatment of prepayments and accrued liabilities related to OPEBs is rescinded.

n62 47 C.F.R. §§ 65.820, 65.830.
n63 47 C.F.R. § 32.17.

IV. PETITION FOR RECONSIDERATION

26. Bell Atlantic filed a Petition for Reconsideration of RAO 20 on June 3, 1992. Since this Order addresses the issues raised in that petition, we dismiss it as moot.

V. NOTICE OF PROPOSED RULEMAKING

A. Preliminary Matters

27. Today, we rescind that portion of RAO 20 addressing the rate base treatment of prepayments and accrued liabilities related to OPEBs. n64 In ordering such rescission, we base our action solely on procedural grounds, and render no decision on the substantive merits of the ratemaking practices at issue. n65 In this Notice of Proposed Rulemaking, we propose amendments to Part 65, Subpart G of our rules, to revise the rate base treatment of prepaid OPEB costs recorded in Account 1410, Other Noncurrent Assets, and all items in Account 4310, Other Long-Term Liabilities, including accrued liabilities related to OPEBs.

n64 See supra part III.B.3, para. 25.
n65 See supra part III.B.

28. Several investigations of LEC tariffs that include exogenous adjustments for OPEB costs are pending. n66 The applicants and some commenters have suggested that we defer modifying our Part 65 regulations until the conclusion of these investigations. n67 Although we do not agree that we should delay our action proposing to modify Part 65 to require the exclusion from the rate base of all items in Account 4310, including accrued liabilities related to OPEBs, we invite comment on this issue.

n66 See discussion supra part II, paras. 8-10.
n67 See discussion supra part III.B.2, paras. 22-24.

29. RAO 20 instructed carriers to include in their rate bases the interstate portion of prepaid postretirement benefits recorded in Account 1410, Other Noncurrent Assets, and to remove from their rate bases the interstate portion of unfunded, accrued postretirement benefits recorded in Account 4310, Other Long-Term Liabilities. n68 The stated rationale for this treatment was that "postretirement benefits are similar to pension expenses . . . and as such should be given the same rate base treatment." n69 Under our current rules, unfunded accrued pension costs recorded in Account 4310 are removed from the rate base, n70 and prepaid pension costs in excess of the SFAS-87 periodic pension cost calculation recorded in Account 1410 are included in the rate base. n71 The FASB has commented on the similarity between SFAS-106, Employers' Accounting for Postretirement Benefits Other Than Pensions, and pension accounting statements SFAS-87 and SFAS-88. n72 "Different accounting treatment is prescribed [in SFAS-106] only when the [FASB] Board has concluded that there is a compelling reason for different treatment." n73 We tentatively agree with the conclusion in RAO 20 that the similarity between OPEB amounts and pension expenses recorded in Accounts 4310 and 1410 justifies this rate base treatment for OPEB amounts, as well as pension expenses, recorded in each of the accounts.

n68 RAO 20, supra note 1, at 2873.
n69 Id. at 2872-73 (emphasis added).
n70 47 C.F.R. § 65.830(a)(3).
n71 See Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 269, para. 43 & n.32 (1987) (citing Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 6675 (1987) (discussing in paragraphs 14 and 15 the inclusion of prepaid pension costs exceeding the SFAS-87 cost calculations in the rate base)), recon., Order on Reconsideration, 4 FCC Rcd 1697 (1989), remanded sub nom. Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990), on remand, Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).

n72 SFAS-106, para. 11 n.6.
n73 Id. (discussing similarities in subheading "Similarity to Pension Accounting" in Summary and identifying major similarities and differences in Appendix B).

B. Proposed Rule

1. Account 1410

30. At this time, under Section 65.820(c), amounts recorded in Account 1410 are included in the rate base "only to the extent that they have been specifically approved by

this Commission for inclusion." SFAS-87 and SFAS-106 set forth standards for calculating the future pension and OPEB costs companies should accrue in the current period. When companies prepay these costs by, for example, paying amounts in excess of the current period expense into employee pension funds, they record these excess contributions in Account 1410. Under our current rules, with the rescission of the rate base portion of RAO 20, prepaid pension costs recorded in Account 1410 are included in the rate base, n74 but prepaid OPEB costs recorded in Account 1410 are not included in the rate base. n75 Both types of excess prepayments, however, produce returns that reduce the pension amounts companies must accrue in future periods. Because investors fund these excess prepayments, we propose to include both types of excess prepayments in the rate base. We invite comment on this proposal.

n74 See Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 269, para. 43 & n.32 (1987) (citing Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 6675 (1987) (discussing in paragraphs 14 and 15 the inclusion of prepaid pension costs exceeding the SFAS-87 cost calculations in the rate base)), recon., Order on Reconsideration, 4 FCC Rcd 1697 (1989), remanded sub nom. Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990), on remand, Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).
n75 47 C.F.R. § 65.820(c).

31. We have allowed prepaid pension costs to be included in the rate base, because pension fund prepayments in excess of the SFAS-87 cost calculation earn a return, which benefits the ratepayer by reducing later expenses. n76 The proposed modification to our rate base rules governing prepaid OPEB costs recorded in Account 1410 is premised on our belief that the rationale underlying the rate base treatment of prepaid pension costs recorded in Account 1410 applies equally to prepaid OPEB costs recorded in that account. We invite comment on our tentative conclusion that prepaid OPEB costs in excess of the SFAS-106 cost calculation benefit the ratepayer and thus justify the inclusion of these prepayments recorded in Account 1410 in the rate base.

n76 See Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, Memorandum Opinion and Order, 2 FCC Rcd 6675, paras. 14-15 (1987), cited in Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 269, para. 43 (1987), recon., Order on Reconsideration, 4 FCC Rcd 1697 (1989), remanded sub nom. Illinois Bell Tel. Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990), on remand, Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Decision on Remand, 7 FCC Rcd 296 (1991), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).

2. Account 4310

32. Under our current Part 65 rules, unfunded accrued pension costs recorded in Account 4310 are removed from the rate base, n77 although other items recorded in Account 4310, such as accrued OPEB liabilities, are not removed from the rate base. We propose amending our Part 65 rules to accord to all items in Account 4310 the same rate base treatment presently accorded unfunded accrued pension costs. We would modify Section 65.830(a), which enumerates specific items to be removed from the rate base, by broadening the current reference to the interstate portion of unfunded accrued pension costs in Section 65.830(a)(3) to include the interstate portion of all items in Account 4310. We also propose conforming amendments to Section 65.830(c), broadening the current reference to the interstate portion of unfunded accrued pension costs to include the interstate portion of all items in Account 4310. We invite comment on these proposals.

n77 47 C.F.R. § 65.830(a)(3).

Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base, 12 FCC Rcd 2321 (1997).

B. MCI Petition for Reconsideration of the Order to Vacate

1. Positions of the Parties

25. In our *Order to Vacate,* we rescinded the rate base instructions contained in *RAO 20*. Our decision was based on our determination that the Bureau did not have the delegated authority to change the Part 65 rules in an RAO letter.[1] MCI asks us to reconsider our decision and to reinstate the rate base instructions related to OPEB.[2] MCI states that we have broad discretion in interpreting our rules and that a rule change is not needed to determine the rate base treatment of OPEB.[3] MCI believes that because the rate base treatment of pensions was already established, and because pensions are similar to OPEB, we can apply the pension rate base rules to OPEB through an interpretation.[4] Southwestern states that our authority to interpret our rules does not include the right to change rules at will without notice and comment.[5]

26. The opposing parties state that we correctly concluded in the *Order to Vacate* that the Bureau has no delegated authority to modify the rate base provisions of Part 65.[6] The opposing parties also assert that it is unreasonable for MCI to conclude that we can interpret Section 65.830 of our rules as currently including the interstate portion of OPEB among those items that must be removed from the interstate rate base. The opposing parties state that the only item recorded in Account 4310, Other long-term liabilities, that should be removed from the rate base is the interstate portion of unfunded accrued pension costs.[7]

27. In reply, MCI states the oppositions failed to demonstrate that a rulemaking proceeding is required to change the rate base treatment of OPEB and that the oppositions failed to refute the principle that administrative agencies are afforded broad

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1 *Order to Vacate*, *supra* n.1 at para. 25.

2 MCI Petition at 2.

3 *Id.*

4 *Id.*

5 Southwestern Reply at 2-3.

6 Ameritech at 2; Bell Atlantic at 1; US West at 2; Southwestern Reply at 2-3.

7 Ameritech at 2; Bell Atlantic at 1-2; US West at 3.

discretion in interpreting their rules.[8] MCI also argues that, because Section 65.830(a)(3) currently lists pension costs as a rate base adjustment and because pensions are similar to OPEB, it is not unreasonable to interpret this section to require the removal of OPEB costs.[9]

2. Discussion

28. We have reviewed MCI's Petition and find that it provides no basis on which to change our *Order to Vacate* decision rescinding the ratemaking guidance for OPEB contained in *RAO 20*. As we stated in the *Order to Vacate*, the Bureau did not have the delegated authority to amend the Part 65 rules. MCI's Petition does not refute this conclusion. We also are not persuaded by MCI's argument that the Commission can amend Part 65 through an interpretation without providing affected parties with any notice of or chance to comment on the amendment.[10] Giving rate base recognition to OPEB in Part 65 would constitute a rule change for which proper notice and comment must be given. Accordingly, for the reasons stated above, we deny MCI's Petition.

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8 MCI Reply at 2.

9 *Id.* at 3.

10 5 U.S.C. §553.

The Commission Should Decline To Order Refunds in its Pending OPEB and "Add-Back" Tariff Investigations Even If It Determines That the Tariffs Were Unlawful

The Commission currently has pending before it three investigations under 47 U.S.C. § 204 — each of which is roughly 10 years old — related to access tariffs that the Verizon telephone companies filed in 1993, 1994, and 1996. Verizon has already explained why those tariffs complied with all applicable Commission rules and were just and reasonable. The purpose of this paper is to explain why, even aside from the fact that Verizon believes its tariffs are lawful on the merits, the Commission should not order refunds after all these years.

First, the Commission is permitted under federal law to order refunds only when a carrier's rates are above its price caps, once adjusted to reflect any Commission decision that a tariff subject to investigation was unjust or unreasonable. But there is substantial "headroom" available in the tariff filings at issue — that is, Verizon's rates were lower than the maximum allowed under the price cap regime. Under settled precedent, it is unlawful for the Commission to require carriers to make refunds to the extent that their rates remain below the price caps. Therefore, as demonstrated below, it would be unlawful for the Commission to order refunds for a significant portion — tens of millions of dollars — of the amounts at issue.

Second, with respect to one of the three investigations — pertaining to Verizon's application of "add-back" in its 1993 and 1994 tariff filings — any order requiring refunds would be unlawfully retroactive because it would deny carriers the benefit of their choice between the "X-factor" options during these tariff years. Moreover, because carriers, in 1993 and 1994, had no way of determining whether the Commission's rules did, or did not, require application of add-back, the Commission is prohibited under general principles of administrative law from penalizing a carrier that selected an option different from the one the Commission later chose.

Finally, beyond these two legal prohibitions on requiring refunds, it would not be equitable to require refunds. As the Commission and the courts have long recognized, the decision whether to order refunds is within the Commission's discretion and requires a balancing of the equities to determine whether such an order is in the public interest. Here, the equities weigh strongly against ordering refunds. No matter how the Commission were to elect to implement such refunds, absent a requirement that the carriers who receive the refunds in turn refund those amounts dollar-for-dollar to their own customers, it would provide unjustified windfalls to the carriers receiving the refunds and no benefits to consumers, contrary to the public interest. In addition, the lengthy delay in resolving these proceedings has prejudiced Verizon's ability to defend its tariff filings.

I. BACKGROUND

A. SFAS 106

The first of the pending investigations involves Bell Atlantic's implementation of a change in the accounting principles that apply to certain costs related to "other post-employment employee benefits" or "OPEB."[1] In December 1990, the Financial Accounting Standards Board ("FASB") adopted SFAS 106, which changed the approved method of accounting for the costs of OPEBs from a "pay-as-you-go" basis — where carriers recognized expenses as benefits were paid to retirees — to an accrual method — where carriers recognize expenses when an employee earns the benefit, not when it is paid out. This change required carriers to recognize a "transitional benefit obligation" or "TBO," representing the OPEB costs for benefits that

[1] *See Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 168 (D.C. Cir. 1994) ("The 'other,' which explains the 'O' in the OPEB acronym, is intended to exclude pension benefits; what is left generally consists of retirees' life insurance and medical and dental care benefits.").

employees had earned, but that the carrier had not yet paid, as of the date the carrier implemented SFAS 106.

The Commission accepted SFAS 106 as a regulatory requirement in an order issued on December 26, 1991.[2] On December 31, 1991, Bell Atlantic informed the Commission of its intent to implement SFAS 106, effective January 1, 1991; the TBO expense ultimately was treated as an exogenous cost in Bell Atlantic's 1993 and 1994 access tariff filings.[3] In 1994, the D.C. Circuit clarified the law on exogenous cost treatment, holding that, once the Commission requires implementation of an accounting change (such as SFAS 106), the requirement that such a cost is beyond the control of the carrier is satisfied.[4]

There was no action in the investigation into these tariffs after 1995 and, in 2001, the Commission terminated its investigation.[5] One year later, the Bureau purported to reinstate that investigation and called for parties to supplement the record.[6] As Verizon has explained elsewhere, Bell Atlantic's implementation of SFAS 106 on December 31, 1991 — after FASB

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[2] *See* Order, *Southwestern Bell, GTE Service Corp., Notification of Intent To Adopt Statement of Financial Accounting Standards No. 106, Employers' Accounting for Postretirement Benefits Other Than Pensions*, 6 FCC Rcd 7560, 7560, ¶ 3 (1991) ("conclud[ing] that . . . adoption [of SFAS 106] for accounting purposes will not conflict with the Commission's regulatory objectives" and "authorizing carriers to implement SFAS-106 on *or before* January 1, 1993") (emphasis added).

[3] Although Verizon initially included the TBO expense as an exogenous cost adjustment in its 1992 filing, the Commission rejected that filing for reasons the D.C. Circuit later found unlawful. *See Southwestern Bell*, 28 F.3d at 173.

[4] *See id.* at 170.

[5] *See* Order, *Termination of Stale or Moot Docketed Proceedings*, 17 FCC Rcd 1199 (2002).

[6] *See* Order, Notice and Erratum, *Stale or Moot Docketed Proceedings: 1993 Annual Access Tariff Filings-Phase I; 1994 Annual Access Tariff Filings, AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464-Phase II; Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690; NYNEX Telephone Cmpanies Tariff F.C.C. No. 1, Transmittal No. 328*, 18 FCC Rcd 2550 (2003), *recon. denied*, FCC No. 04-13 (rel. Feb. 6, 2004).

adopted the accounting change, and the Commission approved it and encouraged early adoption — was consistent with the Commission's rules.[7] Consequently, Bell Atlantic's TBO costs satisfy the standards for exogenous treatment.

B. *RAO 20 Rescission Order*

After the Commission approved the use of SFAS 106, the Common Carrier Bureau issued *RAO 20*,[8] in which it concluded that local exchange carriers must deduct accrued OPEB liabilities from their interstate rate base. By reducing the rate base, the effect of *RAO 20* was to increase the calculated return on investment and thereby, for many price cap carriers, to increase their sharing obligations.

In 1996, the Commission issued the *RAO 20 Rescission Order*, vacating the Bureau's interpretation of the Commission's accounting rules.[9] As the Commission found, its rules in place at the time "define[d] explicitly those items to be included in, or excluded from, the interstate rate base."[10] Because those rules did "not list OPEB costs as items to be excluded from

[7] Direct Case of Verizon, *Stale or Moot Docketed Proceedings*, CC Docket Nos. 93-193 *et al.* (FCC filed Apr. 11, 2003); Rebuttal of Verizon to AT&T Opposition to Direct Case, *Stale or Moot Docketed Proceedings*, CC Docket Nos. 93-193 *et al.* (FCC filed May 27, 2003).

[8] 7 FCC Rcd 2872 (1992).

[9] *See* Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pension in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 11 FCC Rcd 2957 (1996) ("*RAO 20 Rescission Order*"). In a separate proceeding, the Commission amended its accounting rules in 1997 to state expressly that, on a going forward basis, accrued OPEB liabilities, along with other long-term liabilities, are to be deducted from the rate base. *See* Report and Order, *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pension in Part 32; Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, 12 FCC Rcd 2321, 2327, ¶ 19, 2331, ¶ 34 (1997). The Commission also rejected claims that it should reconsider the *RAO 20 Rescission Order*, finding that the Bureau's interpretation constituted an amendment to the Commission's then-existing rules, which the Bureau did not have authority to do. *Id.* ¶ 28.

[10] *RAO 20 Rescission Order*, 11 FCC Rcd at 2961, ¶ 25.

the rate base," the Commission held that the Bureau "exceeded [its] delegated authority to the extent that it directed exclusions from and additions to the rate base for which the Part 65 rules [did] not specifically provide."[11]

In response to that order, Verizon's 1996 access tariff filings reflected the lower sharing obligations that Verizon would have incurred from 1993 through 1995 but for the now-vacated *RAO 20*.[12] The Bureau suspended and investigated these tariff filings.[13] The Bureau never designated issues or established a pleading cycle, and the investigation remained dormant until 2001, when the Commission terminated the investigation.[14] As with the terminated investigation into the implementation of SFAS 106, the Bureau purported to reinstate this investigation more than one year later and called for parties to supplement the record.[15] As Verizon has explained elsewhere, the Commission has already determined that its rules in effect prior to 1997 did not — and cannot be interpreted to — require carriers to deduct OPEB liabilities from the rate base.[16] Furthermore, Verizon has fully supported and documented the basis for its recalculation of its 1993 through 1995 sharing obligations and the concomitant increase to its price cap indexes in its 1996 tariff filings.

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[11] *Id.* at 2960, ¶ 21, 2961, ¶ 25; *see also* Verizon Ex Parte Letter, CC Docket Nos. 93-193 *et al.* (FCC filed Feb. 25, 2004).

[12] However, the former NYNEX companies did not reverse the exclusion of OPEB liabilities from the tariff filings for 1993 through 1995.

[13] *See* Memorandum Opinion and Order, *1996 Annual Access Tariff Filings; National Exchange Carrier Association, Universal Service Fund and Lifeline Assistance Rates; NYNEX Telephone Company Petition to Advance the Effective Date of the 5.3 X-Factor to January 1, 1995*, 11 FCC Rcd 7564 (1996).

[14] *See* 17 FCC Rcd 1199.

[15] *See* 18 FCC Rcd 2550.

[16] Comments of Verizon, *Stale or Moot Docketed Proceedings*, CC Docket Nos. 93-193 *et al.* (FCC filed Apr. 8, 2003); Reply Comments of Verizon, *Stale or Moot Docketed Proceedings*, CC Docket Nos. 93-193 *et al.* (FCC filed Apr. 22, 2003).

C. “Add-Back”

When the Commission adopted price caps for local exchange carriers, it did not make a clean break from the prior system of rate-of-return regulation. Carriers that earned less than 10.25 percent in one year (“Year 1”) were permitted to make a “lower formula adjustment” in Year 2 — that is, to include an exogenous cost increase to make up for the underearnings in the prior year. Carriers that earned more than a certain rate of return — 12.25 percent or 13.25 percent, depending on the productivity factor (or “X-factor”) the carrier selected — in Year 1 were required to make a “sharing” adjustment in Year 2 — that is, to include an exogenous cost decrease, based on the earnings above the permitted rate of return.

Prior to 1995, the Commission did not adopt a rule specifying whether carriers, in calculating their rate of return for Year 2, should use their actual (post-adjustment) earnings or their pre-adjustment earnings. In 1995, the Commission adopted “add-back” for price cap carriers on a going forward basis — the effect of which was to require carriers to use their pre-adjustment earnings — but expressly held that the change to its rules had prospective effect only. *See* Report and Order, *Price Cap Regulation of Local Exchange Carriers; Rate-of-Return Sharing and Lower Formula Adjustment*, 10 FCC Rcd 5656, 5665, ¶ 49 (1995) (“We agree with commenters that the explicit add-back rule adopted here may, as a legal matter, be applied only on a prospective basis.”).

Prior to 1995, in the absence of clear guidance from the Commission, carriers pursued different approaches. In its 1993 and 1994 tariff filings, NYNEX added-back the adjustments based on its earnings from prior years; Bell Atlantic and GTE, in contrast, did not apply add-back in their 1993 and 1994 tariff filings.[17] The Bureau suspended and investigated these tariff filings, but the investigations languished until 2003, when the Bureau issued a Public Notice seeking to refresh the record.[18] As Verizon has explained elsewhere, in the absence of any rule requiring or prohibiting add-back, where carriers took a consistent approach in each tariff year, neither the approach taken by NYNEX, on the one hand, nor the approach taken by Bell Atlantic and GTE, on the other hand, was unreasonable.[19]

II. THE COMMISSION SHOULD CONCLUDE THESE INVESTIGATIONS WITHOUT ORDERING REFUNDS

As described above, Verizon has demonstrated elsewhere that the tariff filings at issue here are lawful and that it should prevail on the merits. The issue addressed here is, even aside from this fact, whether the Commission should order refunds in the even it were to disagree as to one or more of the issues under investigation. The answer is that it should not.

[17] Although these carriers adopted different approaches, each carrier pursued a consistent approach in each of its annual access tariff filings prior to the Commission's rule change adopting add-back. Nor was their decision to apply (or not apply) add-back based on whether they had made a "lower formula" or a "sharing" adjustment. NYNEX's initial application of add-back occurred after it made a lower formula adjustment, but it continued to apply add-back even after its earnings increased and it incurred sharing obligations. GTE did not apply add-back to any of its local exchange carriers, even though some had made lower formula adjustments and others incurred sharing obligations.

[18] Public Notice, *Further Comment Requested on the Appropriate Treatment of Sharing and Low-End Adjustments Made by Price Cap Local Exchange Carriers in Filing 1993 and 1994 Interstate Access Tariffs*, 18 FCC Rcd 6483 (2003).

[19] *See* Comments of Verizon, *1993 Annual Access Tariffs; 1994 Annual Access Tariffs*, CC Docket Nos. 93-193, 94-65 (FCC filed May 5, 2003); Reply Comments of Verizon, *1993 Annual Access Tariffs; 1994 Annual Access Tariffs*, CC Docket Nos. 93-193, 94-65 (FCC filed May 19, 2003).

A. The Commission Is Prohibited From Ordering Refunds For a Substantial Portion of the Amounts at Issue, Because of Headroom in Verizon's Tariff Filings

The Commission's authority to order refunds in a proceeding to investigate a tariff is limited to "such amounts [as] were paid" that were not lawful. 47 U.S.C. § 204(a); *see AT&T Co. v. FCC*, 836 F.2d 1386, 1394 (D.C. Cir. 1988) (FCC may order refunds at conclusion of § 204 proceeding only of "the portion of amounts paid that was not justified"). The Commission, therefore, cannot order refunds of amounts that were *not* paid, but that lawfully could have been charged, because a carrier elected to charge customers rates *lower than* those permitted under the price caps. As Verizon has shown, the rates in its tariff filings for the years at issue were *tens of millions of dollars below* the price caps. It would be unlawful for the Commission to order Verizon to refund these amounts, which it never collected, even though it was entitled to do so.

1. Under the price cap regime in effect at the time the relevant tariffs were filed, the price cap indices ("PCIs") for each basket set an upper limit on a carrier's rates, as measured by the actual price indices ("APIs"). With limited exceptions not relevant here, carriers had discretion to set rates below the PCIs. When a carrier did so, its tariffs had "headroom," which is the amount by which a carrier's APIs were lower than its PCIs. As the Commission has explained, headroom "represents charges that could have been, *but were not*, collected from customers." Memorandum Opinion and Order, *800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services*, 12 FCC Rcd 8396, 8400, ¶ 11 (1997) ("*800 Database Access Tariffs*") (emphasis added).

When the Commission disallows a portion of a price cap carrier's tariff filing, it is concluding that the carrier's *PCIs* — that is, the ceilings on its rates — were too high. But a determination that a carrier's PCIs should have been lower is not equivalent to a determination that a carrier's *rates* were too high and that customers paid too much. On the contrary, the carrier's rates — that is, its APIs — must be compared to its adjusted PCIs before determining whether customers paid rates that were unjust and unreasonable, and subject to refund. If the carrier's APIs remain *equal to or below* the adjusted PCIs, the carrier's rates were within the permissible limit and any refund order would be unlawful. Likewise, in the event the adjusted PCIs are below the carrier's APIs, any order requiring a refund for amounts below the level of the adjusted PCIs also would be unlawful. As the Commission has explained, "[t]here is no basis for 'refunding' . . . amounts [that] were never paid" because the carrier's rates were within the ceiling established by the PCIs. *Id.* More generally, as AT&T has conceded,[20] any lawful refund is limited to the amount by "which [a LEC's] API exceeded the PCI, as adjusted, as required by the Commission" — that is, after any exogenous costs that are disallowed by the Commission are removed from the PCI. *800 Database Access Tariffs*, 12 FCC Rcd at 8400, ¶ 11.

2. In a May 27, 2003 filing, Verizon demonstrated that the rates in Bell Atlantic's 1993 and 1994 tariff filings were substantially below the price cap indices. As a result, those filings included approximately *$47.2 million in headroom*, which is substantially greater than Bell Atlantic's approximately $39 million exogenous adjustments included in those filings for OPEB costs prior to 1993. *See* Rebuttal of Verizon to AT&T Opposition to Direct Case at 10 & Exhs. 1-4, CC Docket Nos. 93-193 *et al.* (FCC filed May 27, 2003).[21] AT&T took issue with

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[20] *See* AT&T Ex Parte Letter at 3, CC Docket Nos. 93-193 *et al.* (FCC filed Aug. 19, 2003) ("AT&T Aug. 19, 2003 Ex Parte").

[21] AT&T has claimed that Verizon's headroom calculations should be viewed with skepticism because they were filed with its Rebuttal, rather than with its Direct Case. *See* AT&T Aug. 19, 2003 Ex Parte at 3. In fact, the timing of Verizon's provision this information was the result of Verizon's need to locate, and hire as a consultant, a former employee who had helped prepare Bell Atlantic's 1993 and 1994 tariff filings, illustrating the manner in which Verizon's ability to defend its tariff filings has been prejudiced by the Commission's lengthy delay in

Verizon's headroom calculations in a subsequent ex parte filing, but *even on AT&T's calculations* the maximum refund that could be ordered if the Commission disallowed these exogenous adjustments would be *less than $7.5 million — not* the $40.6 million that AT&T originally claimed should be refunded. *See* AT&T Aug. 19, 2003 Ex Parte at 3 & Attach.

AT&T, however, continues to present overstated calculations. As the analysis attached hereto demonstrates, the maximum refund that the Commission could lawfully order if it disallowed Bell Atlantic's exogenous adjustments for OPEB costs prior to 1993 included in tariff filings for the period from 1993 through 1995 is *only $2 million*. This analysis, and the errors in AT&T's calculations, are described below.

Attachment 1 is a revision of Exhibit 3 to Verizon's May 27, 2003 filing, which shows the amounts by which Bell Atlantic's tariffed rates for the 1993-1994 tariff period were below the price caps. Verizon has adjusted the price cap indices for the Common Line basket for that tariff period to account for Verizon's 1997 compliance filing.[22] In that filing, Verizon corrected its "g" factor for 1993 and relied on approximately $1 million of the more than $18 million in headroom in that basket (but no other baskets), leaving more than $17 million of headroom remaining in that basket.[23] Attachment 2 replicates the data in Exhibit 4 to Verizon's May 27,

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resolving these proceedings. Indeed, Verizon is still attempting to investigate the headroom available in the GTE tariffs that are under investigation.

[22] In Attachment 1, Verizon has also corrected a typographical error to the API for the Originating CCL Premium in effect on June 30, 1994, which was presented in Exhibit 3 as 0.00885, but should have been 0.008855.

[23] *See* Letter from Joseph J. Mulieri, Verizon, to William F. Caton, Acting Secretary, FCC, Transmittal No. 977 (FCC filed June 30, 1997) ("Transmittal No. 977"). AT&T noted this issue in its August 19, 2003 ex parte. *See* AT&T Aug. 19, 2003 Ex Parte at 3 & n.7. Contrary to AT&T's claim, however, Bell Atlantic did pay refunds, with interest, through an exogenous adjustment to its Common Line price cap index, after the Commission required Verizon to correct the "g" factor for the 1994-1995 tariff period. *See* Transmittal No. 977, Fig. 5, Workpapers E-2, E-5. As AT&T's own calculations show, Bell Atlantic had no headroom available in the Common Line basket for the 1994-1995 tariff period.

2003 filing and shows the amounts by which Bell Atlantic's tariffed rates for the 1994-1995 tariff period were below the price caps.[24] The pages from the tariff filings containing the data used in Attachments 1 and 2, are contained in Attachments 4 and 5, respectively.

Attachment 3 mirrors the attachment to AT&T's August 19, 2003 ex parte, but with AT&T's erroneous calculations corrected. Specifically, AT&T miscalculated the headroom in Bell Atlantic's 1993 tariff filing for three of the four baskets — the Common Line, Traffic Sensitive, and Special Access/Trunking baskets.[25] For the 1993 tariff period, Verizon calculated headroom by averaging the amount by which rates are below the price cap index at the beginning and end of the tariff period — indeed, this is exactly how AT&T calculated available headroom for the Interexchange basket in Bell Atlantic's 1993 tariff filing and for all of the baskets in the 1994 tariff filing.[26] Without offering any explanation, AT&T did not follow this methodology in calculating headroom for the other three baskets in Bell Atlantic's 1993 tariff filing, instead using only the figure for the beginning of the tariff period.[27] The methodology needs to be

[24] Exhibit 4 had incorrectly suggested that the first group of data was drawn from the 1994 OPEB Transmittal No. 690 *and* the 1993 Tariff Review Plan of BATR. Verizon has corrected Attachment 4 to reflect that all of that data came from the 1994 OPEB Transmittal No. 690.

[25] During the 1993 tariff period, the Commission created a new Trunking basket, containing special access services (including the entire basket formerly known as Special Access) and transport services (which had been part of the Traffic Sensitive basket). *See* Second Report and Order, *Transport Rate Structure and Pricing*, 9 FCC Rcd 615 (1994).

[26] For example, as seen on Attachment 1, in 1993 Bell Atlantic's interexchange rates were $1,684,682 below the cap at the beginning of the tariff period (July 1, 1993) and were $1,912,169 below the cap at the end of the tariff period (June 30, 1994). The average of these two figures is $1,798,425.50, which is shown as $1,798,426 in available headroom in Attachment 3 and as $1,798,425 in available headroom in the attachment to AT&T's August 19, 2003 ex parte.

[27] For example, as shown on Attachment 1, at the beginning of the tariff period, Bell Atlantic's special access rates were $152,195 below the cap — which is the figure that appears as the available headroom in the Special Access basket in the attachment to AT&T's August 19, 2003 ex parte. AT&T thus ignored that, mid-way through this tariff period, the Special Access

revised slightly for the 1994 tariff period, because Verizon modified its rates, through Transmittal 690, three-and-a-half months into the tariff period.[28] When the proper methodology is used to calculate the available headroom in Bell Atlantic's tariff filings for the period from 1993 through 1995, it is evident that there is sufficient headroom to eliminate all potential OPEB liability in the 1993-1994 tariff period and all but about $2 million for the 1994-1995 tariff period.

Indeed, even if the Commission disallowed the OPEB exogenous adjustments, Bell Atlantic *would still have more than $9.5 million in headroom remaining* in its 1993 and 1994 tariffs, in the event the Commission also found that Bell Atlantic's decision not to use add-back was unreasonable. On the other hand, if the Commission finds — as it should — that the exogenous adjustments for OPEB costs were consistent with the Commission's rules, then Bell Atlantic would have *more than $47 million in headroom* to apply in the event the Commission found unreasonable Bell Atlantic's decision not to use add-back and sought to order refunds.

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basket was made part of the newly created Trunking basket, in which Verizon's rates were $14,383,350 below the cap by the end of that tariff period. *See supra* note 25. Only by disregarding the Commission's restructuring of the price cap baskets, is AT&T able to ignore more than $7 million in headroom in Verizon's tariff filing.

[28] Therefore, Verizon used a weighted average to calculate headroom, which it applied as follows. As shown in Exhibit 4 to Verizon's May 27, 2003 filing, Verizon's interexchange rates were $1,089,802 below the cap at the beginning of the tariff period (July 1, 1994). Those rates were in effect for 3.5 months. Verizon's Transmittal 690 modified its interexchange rates, so that they were $1,330,261 below the cap. Those rates were in effect for 8.5 months. The weighted average of these amounts, which is shown in Attachment 3, is $1,260,127.13. [$1,089,802 x (3.5 / 12)] + [$1,330,261 x (8.5 / 12)] = $1,260,127.13. As a practical matter, the different calculation methods arrive at virtually the same result, with AT&T's method slightly overstating the headroom available in the Traffic Sensitive and Trunking baskets and slightly understating the headroom available in the Interexchange basket.

B. The Commission Is Prohibited From Ordering Refunds Based on Verizon's Application of "Add-Back," Because Such Refunds Would Be Impermissibly Retroactive

Under the price cap regime in place at the time Verizon made its 1993 and 1994 tariff filings, carriers were permitted to select a productivity, or X-factor, of 3.3 percent or 4.3 percent. A carrier choosing the higher X-factor would have lower price cap indexes, but would be permitted a greater rate of return before the sharing obligation applied. *See Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1199 & n.5 (D.C. Cir. 1996). Prior to the Commission's 1995 decision mandating the use of add-back on a prospective basis, a carrier's choice of X-factor was influenced by its understanding of whether add-back was appropriate; a carrier that did not apply add-back would be more likely to select the lower X-factor, along with its lower sharing threshold. *See id.* at 1207. Indeed, while Bell Atlantic selected the lower X-factor in its 1993 and 1994 tariff filings, when it did not apply add-back, it selected the higher X-factor for its 1995 and 1996 tariff filings, after the Commission made add-back mandatory. Because carriers made these decisions in 1993 and 1994 in the absence of any express guidance, an order requiring refunds based on a finding that some of these carriers chose wrong would retroactively deprive those carriers of "the benefit of th[e] decision" to choose one X-factor rather than the other. *Id.*

Courts distinguish between two types of retroactivity — primary retroactivity, when a decision would "'increase a party's liability for past conduct,'" which is impermissible in the absence of express Congressional authorization, and secondary retroactivity, when a "rule having exclusively 'future effect' . . . affect[s] the desirability of past transactions," which is generally permissible.[29] When the D.C. Circuit upheld the Commission's decision to require the use of

[29] *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588-89 (D.C. Cir. 2001) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)). The Commission has no authority to adopt retroactive rules, which are prohibited by the Administrative Procedures Act. *See id.* at 588.

add-back prospectively, it described "any retroactive effect" of that rule as "only secondary," because "the add-back rule has only future effect" and "does not change or invalidate *any current tariffs*." *Bell Atlantic*, 79 F.3d at 1207 (emphasis added). In contrast, ordering refunds based on the manner in which Bell Atlantic and GTE, on the one hand, or NYNEX, on the other hand, decided to apply add-back *before* the adoption of the Commission's add-back rule would have *primary* retroactive effect, because it would "change or invalidate" the 1993 and 1994 tariffs that the D.C. Circuit explicitly noted were *not* affected by the Commission's new add-back rule. *Id.* Indeed, the D.C. Circuit expressly recognized that carriers that chose the lower X-factor "in previous years" — that is, in 1993 and 1994 — "have already received the benefit of that decision through higher price caps in those years." *Id.* An order requiring refunds would deny carriers "the benefit of [that] bargain" and, therefore, is impermissible.

In any event, there can be no doubt that it was not "ascertainably certain" whether carriers should apply add-back in their 1993 and 1994 tariff filings. *Trinity Broadcasting of Fl., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000). Indeed, the D.C. Circuit has expressly found that, prior to the Commission's adoption of its prospective add-back rule, the "state of the law has *never* been clear." *Bell Atlantic*, 79 F.3d at 1207 (emphasis added); *see id.* (carriers "made their X-factor decisions in the face of *considerable uncertainty* about whether the [price cap regime] included add-back") (emphasis added). Because Verizon, "by reviewing the regulations and other public statements issued by the agency," could not have "identif[ied], with 'ascertainable certainty,'" whether it was required to use add-back, the Commission is prohibited from punishing Verizon for failing to foresee the interpretation the Commission later adopted. *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-34 (D.C. Cir. 1995); *see Trinity*, 211 F.3d at 628;

PMD Produce Brokerage Corp. v. USDA, 234 F.3d 48, 51-54 (D.C. Cir. 2000); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354-57 (D.C. Cir. 1998).

C. The Commission Should Not Order Refunds As an Exercise of Its Equitable Discretion

Even if the Commission were to find a tariff filing unlawful where it was not prohibited from ordering refunds — either because of headroom or because such an order would be impermissibly retroactive — it need not and should not order refunds in these investigations. As the Commission has repeatedly recognized, a finding that a tariff is unlawful — which, as we have shown elsewhere, is not justified here in any event — does not compel the Commission to order refunds. On the contrary, the Commission "can exercise [its] discretion not to order refunds even when there is a finding of overearnings."[30] Refunds, as the federal courts have held and the Commission explained long ago, are "a matter of equity," and the Commission must "balance the interests of both the carrier and the customer in determining the public interest," with "each case . . . examined in light of its own particular circumstances." *American Television Relay,*[31] 67 F.C.C.2d at 708-09, ¶ 15; *see Public Service Comm'n v. Economic Regulatory Admin.*, 777 F.2d 31, 36 & n.5 (D.C. Cir. 1985); *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981). Applying this standard, the Commission has found it inappropriate to order refunds in a number of proceedings where it found that a carrier had overearned.[32] In this

[30] Order on Reconsideration, *800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services*, 12 FCC Rcd 5188, 5196, ¶ 18 (emphasis omitted) ("*800 Data Base Order on Reconsideration*").

[31] Memorandum Opinion and Order, *American Television Relay, Inc., Refunds Resulting from the Findings and Conclusions in Docket 19609*, 17 F.C.C.2d 703 (1978).

[32] *See, e.g.*, Memorandum Opinion and Order, *Tariffs Implementing Access Charge Reform*, 13 FCC Rcd 14683 (1998); Memorandum Opinion and Order, *Local Exchange Carrier Access Tariff Rate Levels; Bell Atlantic Telephone Companies Tariff F.C.C. No. 1; GVNW Inc./Management Bourbeuse Telephone Company Tariff F.C.C. No. 1,* 13 FCC Rcd 6202 (1993);

case, equitable considerations demonstrate that refunds would not be warranted even if the Commission determined that the Verizon tariffs at issue were unlawful in one or more respects.

The Commission historically has used two methods for ordering refunds — either ordering a carrier to make payments (or give credits) to the customers that purchased services from the tariffs while they were effective or ordering a carrier to make going forward reductions through an exogenous adjustment to the carrier's PCIs. Neither would be appropriate here. As described below, such refunds would provide no benefit to end-user customers, and instead would bestow unjustified windfalls on a select group of interexchange carriers.

1. An order requiring Verizon to provide refunds through payments (or credits) to past purchasers would create substantial practical difficulties in implementation. For example, notwithstanding the accounting orders, there will be difficulties in allocating the amount of any refund — which is based on a comparison of the APIs and the adjusted PCIs — to the purchasers from the various tariffs, based on the quantities of each service purchased. In addition, many of the purchasers no longer exist in their prior corporate form, and there likely would be substantial disputes about the appropriate recipients of such refunds.[33] In comparable circumstances, the Commission refused to order refunds, holding that "the significant administrative costs — both to industry and to the Commission — . . . outweigh[] the benefit that would be gained from determining precisely which particular IXC paid more."[34]

Memorandum Opinion and Order, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 5 FCC Rcd 1717 (1990).

[33] *Cf. World Communications, Inc. v. FCC*, 20 F.3d 472 (D.C. Cir. 1994) (reviewing Commission's resolution of dispute between two carriers about which was entitled to refunds due to a company that had ceased doing business).

[34] *Tariffs Implementing Access Charge Reform*, 13 FCC Rcd. at 14752-53, ¶ 178.

In any event, to the extent that the Commission does not, or cannot, require IXCs to pass through any refunds on a dollar-for-dollar basis to the consumers to whom the IXCs passed through Verizon's charges — and in the absence of any likelihood they will do so voluntarily — refunds would provide no benefit to consumers and would serve only to enrich the small group of long-distance carriers that controlled the market a decade ago.

First, AT&T, as a result of its predominant share of the interexchange market at that time, was the largest purchaser during the periods at issue, and thus the largest potential recipient of such refunds. But AT&T recovered additional costs *from its customers* in its 1993 tariff based on the LECs' treatment of OPEB costs.[35] As the Common Carrier Bureau found, in its order investigating AT&T's tariffs, AT&T had raised its rates such that, for two of the price cap baskets, the rates "would exceed the[] [cap] if the indices were adjusted to exclude TBO amounts," which are "directly related to the exogenous treatment of TBO amounts by LECs in their 1993 annual access filings."[36] Therefore, if the Commission were to order refunds after finding — which it should not — that Bell Atlantic's exogenous adjustments for OPEB costs prior to 1993 was unlawful, that would mean that AT&T's prices also were unlawfully high, because they were based, in part, on Bell Atlantic's implementation of SFAS 106. As a result, the Commission would be obligated to order AT&T to refund, dollar-for-dollar, the amounts it collected under tariffs that are subject to investigation in these proceedings as well, lest AT&T receive an unjustified windfall.

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[35] *See* Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, *AT&T Communications Tariff FCC Nos. 1 and 2 Transmittal Nos. 5460, 5461, 5462 and 5464*, 8 FCC Rcd 6227 (1993).

[36] *Id.* at 6227, ¶ 3. That 1993 tariff is still under investigation; the Bureau stayed its consideration of AT&T's tariff filing pending its resolution of the investigation into the LECs' filings. *See id.* at 6227, ¶ 4.

But AT&T undoubtedly would claim that it would be virtually impossible to find and issue refunds to all the customers that AT&T overcharged. As a result of shifts in the market, many customers no longer obtain service from AT&T; instead, many have shifted to long-distance calling options that did not exist in 1993, including wireless service, the Internet, and long-distance services offered by the former Bell companies. Moreover, since the inception of these investigations, AT&T has moved from price cap regulation to non-dominant and non-tariffed deregulation. It is unclear how the Commission, in these changed circumstances could enforce AT&T's obligation to issue refund checks to those customers that purchased under the AT&T tariffs subject to investigation. AT&T presumably would claim that it should be allowed simply to pocket the money and, therefore, would be unjustly enriched by any refund.

Second, refunds would provide a windfall to *any* interexchange carrier that purchased access charges and recovered the alleged overcharges in the tariffs at issue by increasing their rates accordingly, not merely to AT&T. Indeed, at the relevant time, AT&T was the price leader in the market for interexchange services, and other, non-price-cap IXCs generally mirrored AT&T's price increases, which incorporated the effects of increases in the LECs' access tariffs.[37] Such carriers, therefore, were not harmed by any alleged overcharges in the LEC tariffs, because they passed those charges through to their customers. Ordering refunds in the absence of any harm would necessarily provide those carriers with an unearned windfall.[38]

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[37] *See* Declaration of Paul W. MacAvoy ¶¶ 23, 78, Figure 3 (finding that pricing data "suggest a 'follow-the-leader' pattern of pricing behavior, where AT&T leads . . . . [and] MCI and Sprint indicate their willingness to follow AT&T by essentially matching its pricing behavior"), *attached to* Application by Bell Atlantic-New York for Authority To Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295 (FCC filed Sept. 29, 1999).

[38] The prospect of unjust enrichment is particularly evident with respect to WorldCom, which is the second largest potential recipient of refunds and which is in the process of emerging from bankruptcy, where it will avoid a substantial portion of its debts. Any refunds that might be

Even if there were reason to assume that these carriers would pass any refunds through to their customers — and there is no reason to suppose they will — the end-user customers that would benefit are not those that suffered the harm from any alleged overcharges in Verizon's tariffs from 1993, 1994, and 1996. Not only has the passage of time changed the composition of the consumers that use long-distance services, but those consumers now use cell phones, their cable companies (whether through circuit switching or Voice-over-Internet Protocol ("VoIP")), and e-mail as substitutes for wireline long-distance service. Indeed, "[c]ompetition from e-mail and wireless companies . . . has cut into long-distance companies' market share."[39] And VoIP providers, including cable companies, which provide their customers with long-distance services, are taking an ever-increasing share of the market.[40]

2. For the foregoing reasons, any refunds the Commission ordered would, as a practical matter, have to be implemented through a one-time reduction in Verizon's PCIs for its next tariff filing. Such refunds, too, would be inequitable, by providing refunds to carriers that did not purchase services from Verizon's 1993, 1994, and 1996 tariff filings and, therefore, suffered none of the purported harm. The carriers that purchase services from Verizon's access

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due to WorldCom — in a proceeding that, by statute, should have been completed years ago — properly belong to its creditors.

[39] M. Schoener, *et al.*, Gartner, *Fixed Public Network Services, United States, 2001-2007* at 25 (June 17, 2003) ("Residential wireline retail [voice long distance] will continue to see double-digit traffic declines in the face of wireless and Internet substitution."); D. Meyer, *Landline Displacement to be Continued Market Driver*, RCR Wireless News (Nov. 4, 2002) ("the landline displacement market could be worth as much as $50 billion by 2006 with more than 40 percent of all landline calls being usurped by wireless calls in the next several years").

[40] *Bernstein Cable Telephony Report* at 1; *id.* at 4 ("We now believe that by 2006, roughly 82% of total US households will be cable telephony marketable, up from a prior forecast of approximately 70%); *see also UBS High-Speed Data Update* at 12 ("By the end of 2005/2006" the four major "cable operators will have rolled out a cable telephony service across substantially all of their respective footprints, representing total homes of approximately 70 million.").

tariffs today are far different from those that purchased services from the tariffs under investigation. For example, in 1993, AT&T had nearly 60 percent of the long-distance market — as of 2002, its share was half that and it has continued to decline.[41] Moreover, due to the growth in wireless subscribership between 1993 and today — with the number of subscribers increasing from 16 million in 1993 to approximately 150 million in mid-2003[42] — wireless carriers are purchasing from these tariffs in far greater quantities than they did in 1993. In short, many of today's purchasers either did not pay the alleged overcharges 8 to 10 years ago or had a lower market share at that time. Therefore, a refund through a lowering of next year's price cap indices would provide these carriers an unwarranted windfall — the refund would be in excess of the harm, if any, they suffered.

In addition, such a refund order would be inconsistent with the current access charge regime, which has changed substantially since these investigations were initiated. The Commission's 1997 *Access Charge Reform Order*[43] and 2000 *CALLS Order*[44] fundamentally restructured the price caps, shifting costs from traffic sensitive rates paid by interexchange carriers to flat-rates paid by subscribers. The *CALLS Order* also required LECs subject to price caps to reach a "target rate" for their traffic sensitive charges, which was based on an industry-wide compromise designed, in part, to lower the access charges paid by interexchange carriers

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[41] *See* Federal Communications Commission, *Statistics of Communications Common Carriers: 2002/2003 Preliminary Edition*, at Table 1.4 (Nov. 10, 2003).

[42] *See* CTIA, CTIA's Semi-Annual Wireless Industry Survey Results: June 1985-June 2003, *at* http://www.wow-com.com/pdf/MidYear_2003_survey.pdf.

[43] *See* First Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982 (1997), *petitions for review denied*, 153 F.3d 523 (8th Cir. 1998).

[44] *See* Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, *Access Charge*

and, in turn, to facilitate reductions in long-distance rates paid by consumers. As the Commission explained in that order, the "purpose of establishing a target rate is to guarantee a particular rate level for switched access services."[45] Ordering a "refund" that has the effect of reducing access charges would go beyond the rate reductions called for in the *CALLS Order*, and undo the "guarantee" that was part of the CALLS compromise that the Commission approved.

3. Regardless of the method used, ordering refunds would be inequitable because the Commission's lengthy delays in resolving each of these issues have prejudiced Verizon's ability to defend the tariff filings at issue.[46] In the more than 10 years since the Bureau initiated the first of these investigations, key personnel and expert witnesses who helped prepare Verizon's tariff filings have left the company or moved on to other responsibilities and memories have faded. All of this has impaired Verizon's ability to reconstruct and defend the complex calculations and studies that resulted in the tariff filings made in 1993, 1994, and 1996. Indeed, Verizon is still attempting to investigate the available headroom in GTE's 1993, 1994, and 1996 tariff filings — calculations that could have been completed quickly 8 or 10 years ago. It is simply inequitable for the Commission to order refunds when its own delay has compromised a party's ability to defend its decade-old tariff filings and therefore contributed to an adverse ruling on the tariff's lawfulness.

Reform; Price Cap Performance Review for Local Exchange Carriers, 15 FCC Rcd 12962, 13025-39, ¶¶ 150-184 (2000) ("*CALLS Order*").

[45] *CALLS Order*, 15 FCC Rcd at 13030, ¶ 164.

[46] Although the Commission has previously rejected claims that a "proceeding has gone on too long equitably to require that any refunds be ordered," those claims were based on assertions that the delay in resolving the proceedings increased the carriers' liability exposure, which is not Verizon's claim here. *800 Data Base Order on Reconsideration*, 12 FCC Rcd at 5194-95, ¶ 16.

Bell Atlantic
Amount Priced Below Cap for 1993/1994 Tariff Period

Attachment 1
(revises Exhibit 3 to Verizon's May 27, 2003 filing)

	1993 Annual Compliance #579 7/1/93				**Indices and Rates in Effect on 6/30/1994**			
	PCI or Maximum Allowable	API or Rate	Revenues	Amount Below	PCI or Maximum Allowable	API or Rate	Revenues	Amount Below
	A	B	C	D=((B-A)/A)*C	A	B	C	D=((B-A)/A)*C
Terminating CCL Premium	0.00917	0.008829	270288491	(10,051,077)	0.009197	0.008855	228490026	(8,496,639)
Terminating CCL Non Premium	0.004127	0.003973	46299	(1,728)	0.004139	0.003985	31633	(1,177)
Originating CCL Premium	0.00917	0.008829	183214208	(6,813,091)	0.009197	0.008855	250332466	(9,308,873)
Originating CCL Non Premium	0.004127	0.003973	6648	(248)	0.004139	0.003985	4108	(153)
Traffic Sensitive	88.8299	86.3836	934350644	(25,731,223)	88.9248	86.4752	485937801	(13,386,066)
Special Access	88.517700	88.4812	369094125	(152,195)				
Trunking					90.0006	88.4832	853110660	(14,383,350)
Interexchange	98.658300	97.4858	141755085	(1,684,682)	98.8142	97.4858	142238351	(1,912,169)
Total				(44,434,244)				(47,488,427)

SOURCES

	1993 Tariff Review Plan of BATR/TM # 977				**1994 Tariff Review Plan of BATR/TM # 977**			
Terminating CCL Premium	Line 39 WP A-3	RTE-1 Ln 140 Col D	RTE-1 Ln 140 Col G		Line 7 WP B-3	RTE-1 Ln 140 Col C	RTE-1 Ln 140 Col F	
Terminating CCL Non Premium	45% of Terminating CCL Prem	RTE-1 Ln 150 Col D	RTE-1 Ln 150 Col G		45% of Terminating CCL Prem	RTE-1 Ln 150 Col C	RTE-1 Ln 150 Col F	
Originating CCL Premium	Line 39 WP A-3	RTE-1 Ln 160 Col D	RTE-1 Ln 160 Col G		Line 8 WP B-3	RTE-1 Ln 160 Col C	RTE-1 Ln 160 Col F	
Originating CCL Non Premium	45% of Originating CCL Prem	RTE-1 Ln 170 Col D	RTE-1 Ln 170 Col G		45% of Originating CCL Prem	RTE-1 Ln 170 Col C	RTE-1 Ln 170 Col F	
Traffic Sensitive	IND-1 Ln 150 Col A	IND-1 Ln 150 Col B	SUM-1 Ln 170 Col C		IND-1 Ln 160 Col I	IND-1 Ln 160 Col G	SUM-1 Ln 170 Col B	
Special Access	IND-1 Ln 280 Col A	IND-1 Ln 280 Col B	SUM-1 Ln 220 Col C		NA	NA	NA	
Trunking	NA	NA	NA		IND-1 Ln 520 Col I	IND-1 Ln 520 Col G	SUM-1 Ln 220 Col B	
Interexchange	IND-1 Ln 290 Col A	IND-1 Ln 290 Col B	SUM-1 Ln 230 Col C		IND-1 Ln 600 Col I	IND-1 Ln 600 Col G	SUM-1 Ln 230 Col B	

Bell Atlantic
Amount Priced Below Cap for 1994/1995 Tariff Period

Attachment 2
(revises Exhibit 4 to Verizon's May 27, 2003 filing)

	1994 OPEB Transmittal #690				**1994 Annual Compliance Filing 7/1/94**			
	PCI or Maximum Allowable	API or Rate	Revenues	Amount Below	PCI or Maximum Allowable	API or Rate	Revenues	Amount Below
	A	B	C	D=((B-A)/A)*C	A	B	C	D=((B-A)/A)*C
Terminating CCL Premium	0.00757	0.00757	195332523	-	0.00752	0.00752	194042348	-
Terminating CCL Non Premium	0.003407	0.003407	27045	-	0.003384	0.003384	26863	-
Originating CCL Premium	0.00757	0.00757	214005282	-	0.00752	0.00752	212591772	-
Originating CCL Non Premium	0.003407	0.003407	3512	-	0.003384	0.003384	3488	-
Traffic Sensitive	84.3909	84.3893	474216103	(8,991)	84.1617	84.1552	472900822	(36,523)
Special Access								
Trunking	85.4235	85.4234	823610236	(964)	85.1775	85.177	821234492	(4,821)
Interexchange	93.371700	92.4509	134892160	(1,330,261)	93.2039	92.4509	134892160	(1,089,802)
Total				(1,340,216)				(1,131,146)

SOURCES

	1994 OPEB Transmittal #690				**1994 Tariff Review Plan for 1994 Annual Compliance**			
Terminating CCL Premium	CCL-1 Ln 480 Col A	RTE-1 Ln 140 Col D	RTE-1 Ln 140 Col G		CCL-1 Ln 480 Col A	RTE-1 Ln 140 Col D	RTE-1 Ln 140 Col G	
Terminating CCL Non Premium	45% of Terminating CCL Prem	RTE-1 Ln 150 Col D	RTE-1 Ln 150 Col G		45% of Terminating CCL Prem	RTE-1 Ln 150 Col D	RTE-1 Ln 150 Col G	
Originating CCL Premium	CCL-1 Ln 480 Col A	RTE-1 Ln 160 Col D	RTE-1 Ln 160 Col G		CCL-1 Ln 480 Col A	RTE-1 Ln 160 Col D	RTE-1 Ln 160 Col G	
Originating CCL Non Premium	45% of Originating CCL Prem	RTE-1 Ln 170 Col D	RTE-1 Ln 170 Col G		45% of Originating CCL Prem	RTE-1 Ln 170 Col D	RTE-1 Ln 170 Col G	
Traffic Sensitive	IND-1 Ln 160 Col A	IND-1 Ln 160 Col B	SUM-1 Ln 170 Col C		IND-1 Ln 160 Col A	IND-1 Ln 160 Col B	SUM-1 Ln 170 Col C	
Special Access	NA	NA	NA		NA	NA	NA	
Trunking	IND-1 Ln 520 Col A	IND-1 Ln 520 Col B	SUM-1 Ln 220 Col C		IND-1 Ln 520 Col A	IND-1 Ln 520 Col B	SUM-1 Ln 220 Col C	
Interexchange	IND-1 Ln 600 Col A	IND-1 Ln 600 Col B	SUM-1 Ln 230 Col C		IND-1 Ln 600 Col A	IND-1 Ln 600 Col B	SUM-1 Ln 230 Col C	

Attachment 3

Bell Atlantic's Available Headroom and OPEB Exogenous Cost Adjustments for 1993/1994 and 1994/1995 Tariff Periods

1993/1994 Tariff Period

	Common Line	Traffic Sensitive	Special Access/Trunking*	Interexchange	Total
Available Headroom (Attachment 1)	(17,336,493)	(19,558,645)	(7,267,773)	(1,798,426)	
1991 and 1992 OPEB Exog Cost	16,509,680	13,883,140	5,628,300	1,500,880	
Maximum Lawful Potential Refund	-	-	-	-	0
Remaining Headroom After Refund	(826,813)	(5,675,505)	(1,639,473)	(297,546)	(8,439,337)

* During the tariff period, Special Access became part of the newly created Trunking basket, along with a portion of the Traffic Sensitive basket

1994/1995 Tariff Period

	Common Line	Traffic Sensitive	Trunking	Interexchange	Total
Available Headroom (Exh. 4, 5/27/03)	-	(17,021)	(2,089)	(1,260,127)	
1991 and 1992 OPEB Exog Cost	1,012,380	366,180	667,740	107,700	
Maximum Lawful Potential Refund	1,012,380	349,159	665,651	-	2,027,190
Remaining Headroom After Refund	-	-	-	(1,152,427)	(1,152,427)